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NO. 84-803

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Supreme Court, U.S.
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THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

CAROLIN BURBANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

DOES THE FOURTH AMENDMENT PROHIBIT THE PERSONAL SEARCH OF A CITIZEN IN A PRIVATE RESIDENCE WHERE (1) THE SEARCH WARRANT DOES NOT AUTHORIZE THE SEARCH OF THAT CITIZEN, (2) WHERE THE SEARCHING OFFICER DID NOT READ THE SEARCH WARRANT, (3) WHERE THE OFFICER DID NOT TESTIFY TO A SEARCH FOR REASONS OF SAFETY , AND (4) WHERE THE OFFICER DID NOT TESTIFY TO A SEARCH SUSPECTING CONTRABAND?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported as yet. (Pet. App. A) The Order of the Michigan Supreme Court is unreported. (Pet. App. B)

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

Defendant was charged with possession with intent to delivery methamphetamine. The preliminary examination and a subsequent evidentary hearing comprise the record in this case.

Carolin Burbank was present in a home subject to a search warrant for controlled substances.

When police officer Charnitta Perdue entered the dwelling, Carolin Burbank was in the living room facing the wall:

> Q Do you know whether that search warrant authorized you to search individuals on the premises?
>
> A I didn't read the search warrant to know what was in it. (Prelim. Exam. 23)

The officer noted something in Carolin Burbank's brassiere.

> Q What did those bulges look like?
>
> A I couldn't really say what it looked like. It was something in there that didn't belong there. (Prelim. Exam. 25) (Emphasis added)
>
> . . . .
>
> A It looked like something that she had just stuck in her brassiere. What, I don't know. (Prelim. Exam. 25-26)

Alone with Carolin Burbank, Officer Perdue took Carolin Burbank to a room and removed the items.

Officer Perdue gave no testimony regarding fear of Carolin Burbank, any suspicion regarding weapons, nor a need for protection:

> Q You didn't ask anybody to assist you because you were afraid; isn't that right?
>
> A That's correct. (Evid. Hearing 14)

Officer Perdue gave no testimony that she thought the "something" was contraband. She gave no testimony that she had personal experience regarding concealed contraband.

REASONS FOR DENYING THE WRIT

> The Fourth Amendment prohibits the personal search of a citizen in a private residence where (1) the search warrant does not authorize the search of that citizen, (2) where the searching officer did not read the search warrant, (3) where the officer did not testify to a search for reasons of safety, (4) where the officer did not testify to a search suspecting contraband.

A.

Individualized cause to search a citizen is required.

The protections of the Fourth and Fourteenth Amendments do not give way to permit evidence searches of persons who, at the commencement of a search, are on compact premises subject to a search warrant.

In Ybarra v. Illinois, 444 U.S. 85 (1979), this Court reaffirmed this proposition. 444 U.S. at 94. In that case, the State sought to apply the Terry v. Ohio, 392 U.S. 1 (1967), reasonable belief or suspicion standard to aid the evidence-gathering function of the search warrant. This Court rejected the proposed constitutional infringement, saying:

> The long prevailing constitutional standard of probable cause embodies the best compromise that has been found for accomodating the often opposing interests' in safeguarding citizens from rash and unreasonable interferences with privacy and in seeking to give fair leeway for enforcing the law in the community's protection. 444 U.S. at 95.

In Ybarra the State failed in its attempt to bypass the probable cause standard. This Court refused to permit searches of such persons "at least where police have a reasonable belief that such persons are connected with drug trafficking and may be concealing or carrying the contraband." Id. at 94.

Here, the State seeks review of a proposition far beyond that already rejected in Ybarra.

The rule sought by the State eliminates the following constitutional protections:

(1) Probable cause to believe that the persons to be searched are connected with the crime.

(2) Reasonable belief that the person to be searched is dangerous.

(3) This Court's emphasis on the rule of the magistrate in directing who will be searched pursuant to a warrant. See, e.g., United States v. Leon, ____ U.S. ____ (1984).

(4) The basic tenet that merely associating with a person suspected of criminal activity does not strip away the protections of the Fourth Amendment. State v. Broadnax, Wash., 654 P.2d 96 (1982) (search of private residence where narcotics had probably been sold within the preceding 24 hours; held, regardless of the setting, constitutional protections are held individually).

In reaffirming the probable cause requirement, Ybarra recognized that over 30 years ago the Court rejected a similar argument in United States v. DiRe, 332 U.S. 581 (1947).

Similarly, in Dunaway v. New York, 442 U.S. 200 (1979), where seizure was the issue, the Court declined the State's invitation to dispense with the probable cause requirement:

> The requisite balancing has been performed in centuries of precedent and is embodied in the principle that seizures are reasonable only if supported by probable cause.

Similarly, it seems clear that the Terry limits upon the intensity of the search should generally be applicable in this situation as well:

> Under that doctrine a law enforcement officer for his own protection and safety may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. Ybarra v. Illinois, 444 U.S. at 93. See also Sibron v. New York, 392 U.S. 40, 64 (1968).

The operating principle is the sound one of requiring individualized justification before government interfers with the right to privacy, including (1) articulated reasons for initiating a search of a citizen, and (2) articulated reasons for intensifying the search.

For example, here Officer Perdue, the Officer who conducted the search of Carolin Burbank, (1) had not read the

search warrant, (2) gave no testimony that this search was for self protection, (3) gave no testimony that she thought the items might be contraband, and (4) testified simply that "I couldn't really say what it looked like." (Prelim. Exam. 25)

The present rule protects a doctor making a house call, a plumber, a neighbor, a television repairman, a school teacher discussing the progress of children, and all others when there is not demonstrable nexus with danger or crime.

The principle which emerges from the decisions is that it is not constitutionally permissible to search a person, not connected in any way with the place being searched, who merely happens to be upon the premises and who is not mentioned or described in the affidavit of probable cause upon which the warrant was issued. Rather, the law requires that there be probable cause to believe that such persons are themselves participating in criminal activity, or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched. This is certainly correct, for a broader power to search persons present at the place to be searched would provide for a general search or one conducted on mere suspicion.

B.

General Warrants are prohibited.

Here, someone in the house allegedly sold heroin to an informant.

The officer who searched Carolin Burbank did not read the search warrant.

Here, the officer ignored the search warrant. The requirement of particularity is to give direction to police.

The Fourth Amendment protects persons. The requirement of individualized cause to search a citizen cannot be deleted from it in the categorical fashion sought here. If police can search any place or any person found on premises during execution of a search warrant without regard to the specific directions in

the warrant, then they are effectively operating under a general warrant and usurping the function of the magistrate.

Specificity is the primary buffer placed between governmental intrusion and the individual. In discussing the Fourth Amendment in Stanford v. Texas, 379 U.S. 476 (1965), Justice Stewart, expressing the unanimous view of the Court, wrote:

> The hated writ of assistance had given Customs officials blanket authoritity to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." 379 U.S. at 481-482.

Finally, the preferred status afforded privacy in the home does not evaporate upon initial entry:

> The home is sacred in Fourth Amendment terms not primarily because of the occupants possessory interest in the premises, but because of their privacy interests in activities that take place within. Segura v. United States, ____ U.S. ____ (1984).

The primacy of these protections is apparent from the language of the Fourth Amendment itself, the right of the people to be secure in their persons, houses ... against unreasonable searches and seizures, shall not be violated[.]

A search warrant for a place does not permit police searches of individuals absent articulated cause.

CONCLUSION

The principles involved herein are matters well settled by recent and time honored case authority. The decision below was required by the record in this case. It was reached using correct legal principles, is not in conflict with any other decision, and is dependent solely upon its own unique facts.

RELIEF REQUESTED

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

F. RANDALL KARPONTA, in compliance with Supreme Court Rule 28.4(a) and 28.5(b) does hereby certify that he is a member of the Bar of the Supreme Court and that on the 24th day of December, 1984, did deposit in the United States mail with postage fully prepaid, one (1) copy of the Brief for Respondent In Opposition addressed to Timothy A. Baughman, Principal Attorney, 12th Floor, 1441 St. Antoine, Detroit, Michigan 48226.

E. Randall Karponta

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